FILE COPY

Office-Supreme Court, U. S.
FILED
AUG. 11 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 214

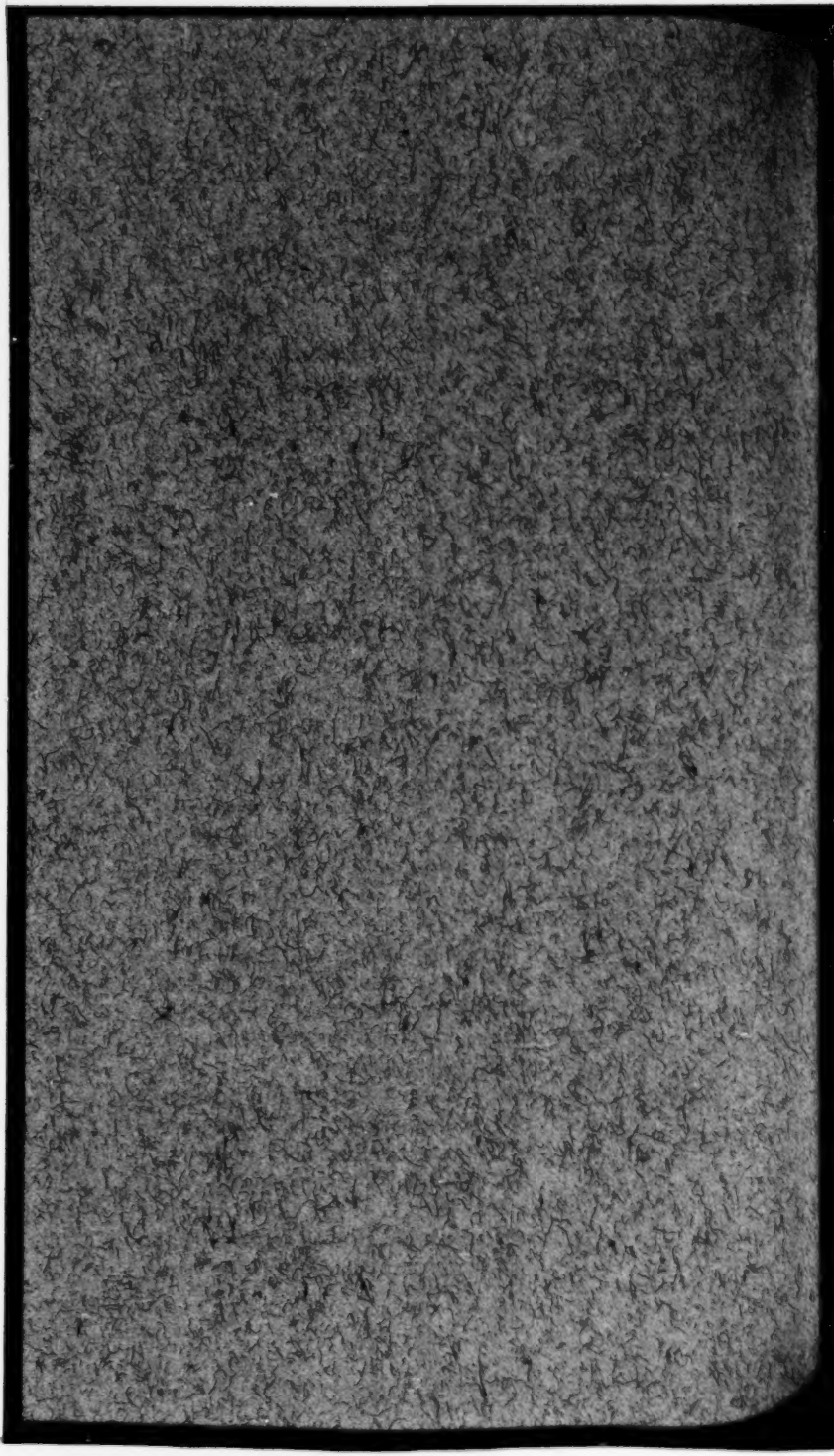
H. B. GANTT, *Petitioner*,

v.

FELIPE Y CARLOS HURTADO & CIA., LTDA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

EDWARD JEROME,
Counsel for Petitioner.



INDEX

Subject Index

	Page
Petition for a writ of certiorari	1
Summary statement of the matter involved	1
Reasons relied on for the allowance of the writ	7
Prayer for writ	8
Brief in support of petition for writ of certiorari	9
I. The opinions of the courts below	9
II. Jurisdiction	9
III. Statement of the case	11
IV. Specification of errors	13
V. Argument	13
Summary of argument	
Point A. The judgment is final, so far as the jurisdiction of this Court applies, in that it denies a right or defense guaranteed by the Constitution of the United States	13
Point B. Since the alleged agreement to submit to arbitration is by statute of the state made unenforcible in North Carolina, both Sections 1 and 2 of Article IV of the Constitution of the United States require that the agreement be held to be unenforcible in New York, and that the arbitration demanded by respondent be permanently enjoined	13
Point C. Since the alleged agreement to submit to arbitration is by statute of the state made void in North Carolina, both Sections 1 and 2 of Article IV of the Constitution of the United States require that the agreement be held to be void	

Page

in New York, and that the arbitration demanded by respondent be permanently enjoined 13, 14

Point D. Since the alleged agreement to submit to arbitration is unenforcible in North Carolina, both Sections 1 and 2 of Article IV of the Constitution of the United States require that the agreement be held to be unenforcible in New York, and that the arbitration demanded by respondent be permanently enjoined 14

Conclusion 23

TABLE OF CASES CITED

Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8 ..... 4, 10, 15

Bond v. *Hume*, 243 U. S. 15 17

Bradford Electric Light Co. v. *Clapper*, 286 U. S. 145 ..... 7, 10, 16

Broderick v. *Rosner*, 294 U. S. 629 ..... 7, 10

Cole v. *Cunningham*, 133 U. S. 111 20

Gilbert v. *Burnstine*, 255 N. Y. 348 20

Hamilton v. *Home Insurance Co.*, 137 U. S. 370 15

Hamlyn & Co. v. *Talisker Distillery*, 1894 A. C. 202 22

Hartford Acc. & Ind. Co. v. *Delta & Pine Lumber Co.*, 292 U. S. 143 17

Lehman, Matter of v. *Ostrovsky*, 264 N. Y. 130 15

Meacham v. *Jamestown F. & C. R. R. Co.*, 211 N. Y. 346 ..... 15, 22

Mt. Vernon-Woodbury Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U. S. 30 ..... 4, 10, 15

Nelson v. *Atlantic Coast Line*, 157 N. C. 194 18

Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109 ..... 16, 22

Tarpley v. *Arnold*, 226 N. C. 679 ..... 18, 19

United Commercial Travelers v. *Wolfe*, 331 U. S. 586 ..... 4, 7, 10, 17, 18, 20

United Culinary Bar & Grill Employees, Matter of v. *Schiffman*, 272 App. Div. 491 21

Page

Table of Statutes Cited

Vitaphone Corp. v. *Electrical Research Products*, 19 Del. Ch. 247, 20 Del. Ch. 47 21
Williams v. *Manufacturing Co.*, 154 N. C. 205 18
Civil Practice Act of New York, Section 1450 21
Federal Arbitration Act, Section 4, Title 9, United States Code 7, 20
General statutes of North Carolina (1943), Division II, Chapter 1, Article 45, Sections 1-544 and 1-545, Volume I 3
Judicial Code of the United States, Section 237, Subsection (b), as amended by the Act of February 13, 1925, c. 229; Title 28, Section 344, United States Code 3, 9, 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 214

R. B. GANTT, *Petitioner,*

v.

FELIPE Y CARLOS HURTADO & CIA., LTDA.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of R. B. Gantt would respectfully show to this Honorable Court:

A

Summary Statement of the Matter Involved

The petitioner, a citizen and resident of North Carolina, has been denied by judgment, rendered by the Court of Appeals of the State of New York, a permanent injunction to restrain a demand for arbitration made upon him, pursuant to an alleged agreement to submit to arbitration any controversy which might arise under a contract in foreign commerce allegedly made by petitioner and an

alien in North Carolina. Both the common law and the statutes of North Carolina make void, as petitioner contends, and unenforceable, as the Court of Appeals says in its opinion, the alleged agreement to submit to arbitration. Petitioner, therefore, has contended that, whether this agreement be unenforceable or void, Article IV, Sections 1 and 2, of the Constitution of the United States requires a permanent restraint of the demand for arbitration.

The alleged agreement to submit to arbitration was contained in the alleged contract. Hurtado & Cia., Ltda., the respondents, which demanded the arbitration, is a firm or corporation of Nicaragua. The alleged contract was that respondent would sell, and petitioner buy, lumber which would be delivered f.a.s. vessel at some port in Nicaragua, and the contract was allegedly made in petitioner's office in North Carolina by one who is alleged to have been petitioner's agent and by a member of the respondent firm. A request by respondent's representative that petitioner sign the document was refused, and it is admitted that petitioner did not sign although respondent alleges facts which may be sufficient to constitute an estoppel against petitioner's denial of liability to buy the lumber.

The alleged agreement to submit to arbitration is as follows:

> Any controversy or claims arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the rules of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by the arbitrators or a majority of them may be entered in any Court having jurisdiction. The arbitration shall be held in New York, New York.

Petitioner, denying the authority of his agent, refused to perform the contract, and thereupon respondent de-

manded that a penalty and damages be awarded by arbitrators in New York. This demand was sent to petitioner in North Carolina by mail from New York. An order restraining the arbitration was sought by petitioner in the Supreme Court of New York, first upon the ground that he was not bound by the contract, and a temporary restraining order pending the determination of this issue of fact by a jury was granted. Later petitioner moved to make the temporary restraining order a permanent injunction upon the grounds set forth above, and others not here involved.

The Supreme Court of the State of New York, County of New York, denied petitioner's motion for a permanent injunction, and this decision has been affirmed by both the Appellate Division of the Supreme Court and the Court of Appeals.

B

Statement of the Basis of Jurisdiction to Review

1. Petitioner contends that this Court has jurisdiction to review the judgment in question under Section 237, Subsection (b) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229; Title 28, Section 344, United States Code.

2. The statute of the State of North Carolina, the validity or effect of which is involved, is in Volume I, page 387, of the General Statutes of North Carolina (1943), Division II, Chapter 1, Article 45, Sections 1-544 and 1-545, and is as follows:

Agreement for Arbitration.—Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this article, any controversy existing between them at the time of the agreement to submit. Such an agreement shall be valid and enforceable, and

neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or in equity for the rescission or revocation of any contract (1927, c. 94, s. 1).

Statement of questions in controversy.—The arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based (1927, c. 94, s. 2).

3. The date of the judgment sought to be reviewed is May 21, 1948, and this petition for a writ of certiorari was presented on the 11th day of August, 1948.

4. The case involves commerce with a foreign nation, and petitioner asserts a substantive right or immunity under the Constitution of the United States of the kind involved in *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, which case is also relied upon to sustain the jurisdiction of this Court to grant a writ of certiorari. So far as the finality of the judgment is involved, the cases which sustain the jurisdiction of this Court to review the judgment at this stage of the case are *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, and *Mt. Vernon-Woodbury Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30. Petitioner contends that the questions involved are substantial upon the grounds that the decision has the effect of making a contract in commerce which cannot validly exist in some states have such existence in other states. Unless the decision is reversed, one who is engaged in commerce and who desires to protect himself against an action at law in another state cannot rely upon an executory agreement to submit to arbitration as protection.

5. The Federal questions sought to be reviewed were raised in the proceedings in the Court of the first instance as a trial of an issue of fact was about to be had to determine whether petitioner was bound by the act of his agent in signing the contract which contained the agreement to submit to arbitration a controversy arising under the contract (R. 2). The method of raising the Federal questions presented was by an affidavit served and filed for the purpose of obtaining an order that respondent show cause why the trial of the issues of fact should not be restrained and the temporary restraining order against proceeding with the arbitration be made a permanent injunction (R. 3).

6. The Federal questions presented were passed upon by the Court of the first instance by denying petitioner's contentions and saying:

> We are not dealing here with the enforcement of petitioner's substantive rights nor does the withholding of the injunction subject the petitioner to "irremediable liability".
>
> Whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum (*Franklin Sugar Refining Co.* v. *Lipowica*, 247 N. Y. 465) (R. 25).
>
> The rules stated by the Supreme Court of the United States in *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145 and *Broderick* v. *Rosner*, 294 U. S. 629, do not contain the solution of the problem with which we are confronted in this proceeding (R. 24).
>
> The Appellate Division wrote no opinion.

7. The Federal questions presented were passed upon by the Court of Appeals by saying in its opinion:

> Having thus found that the arbitration treaty we are passing on was not void but unenforceable only, at the place where made, we turn to the question of

whether it may be compulsorily enforced by the courts of New York (R. 28).

Petitioner insists that all this has been changed by Order of *United Commercial Travelers* v. *Wolfe* (331 U. S. 586). We, however, do not think that decision wipes out the old rule that remedies, including arbitration, are regulated by the law of the forum, including the remedy of arbitration (R. 29).

What we have said herein will, we think, serve as an answer to petitioner's contention that the refusal of the permanent stay of this arbitration deprives him of the privileges and immunities he is entitled to under section 2, article IV of the United States Constitution and his further contention that to allow the arbitration to proceed in New York will be to refuse full faith and credit to the laws of North Carolina (R. 30).

C

The Questions Presented

Petitioner respectfully submits that the following questions are presented:

1. Whether the North Carolina statutes on arbitration apply and make the alleged agreement to arbitrate either void, as petitioner contends, or unenforeable, as the Court of Appeals says in its opinion, so that Article IV, Section 1, of the Constitution of the United States requires the Courts of New York to hold that the alleged agreement to arbitrate is unenforceable and to grant petitioner's prayer for a permanent injunction against the arbitration involved herein?

2. Whether petitioner has in North Carolina an immunity against being compelled to abide by a decision of arbitrators on any controversy that may arise after the making of an agreement to submit the controversy to arbitrators, so that Article IV, Section 2, of the Constitution

of the United States requires the Courts of New York to protect petitioner's immunity herein asserted, and to grant petitioner's prayer for a permanent injunction against the arbitration demanded herein?

3. Whether the law of North Carolina makes the alleged agreement to submit to arbitration either void or unenforceable so that, pursuant to Article IV, Sections 1 and 2, or either, of the Constitution of the United States, the refusal of the permanent injunction prayed for by petitioner was reversible error?

D

Reasons Relied on for the Allowance of the Writ

Petitioner respectfully presents reasons for the allowance of a writ of certiorari as follows:

1. A Federal question of substance not heretofore determined by this Court has been decided by the Court of Appeals, in that: commerce with a foreign nation is involved; and neither commerce with foreign nations nor commerce among the states can be conducted with reasonable certainty if an executory agreement to arbitrate does not validly exist in the State in which the parties were trading and does validly exist in another state.

2. The decision of the Court of Appeals is not in accord with applicable decisions of this Court in *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586; *Broderick* v. *Rosner*, 294 U. S. 629; and *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145.

3. Although neither party has previously raised the question whether the Federal Arbitration Act, Title 9, United States Code, applies or has any effect here, and petitioner is advised that any attempt to have raised such

a question would have been premature, and still is, petitioner respectfully invites the Court's attention to the possibility that the Federal Arbitration Act may apply or affect this case, and suggests that this possibility gives good reason for granting a writ of certiorari.

4. The decision of the Court of Appeals subjects petitioner to "irremediable liability" in that, if the reasons given above are valid, the present holding of the Court of Appeals requires petitioner to attend with seven or eight witnesses from North Carolina a useless trial of the issue of fact, whether the alleged agent had authority to bind petitioner, all to petitioner's irreparable injury, in an amount estimated at approximately $3,000 (R. 4).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, County of New York, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 28003-1946, *In the Matter of R. B. Gantt, Petitioner, To Restrain Arbitration* v. *Hurtado & Cia., Ltda., Respondent,* and that the said judgment of the Court of Appeals of New York may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

R. B. GANTT,
By EDWARD JEROME,
Counsel for Petitioner.

HORACE A. TEASS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 214

R. B. GANTT, *Petitioner,*

v.

FELIPE Y CARLOS HURTADO & CIA, LTDA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion in the Court of Appeals is reported in 297 N. Y. 433 (R. 21), and the opinion of the court of first instance is reported in 189 N. Y. Miscellaneous Reports 237 (R. 26).

II

Jurisdiction

1. The statutory provision that the petitioner contends sustains the jurisdiction of this Court to review the judgment in question is Section 237, Subsection (b) of the Judicial Code of the United States, as amended by the

Act of February 13, 1925, c. 229; Title 28, Section 344, United States Code.

2. The date of the judgment to be reviewed is May 21, 1948, and it was entered on the same date (R. 33).

3. The grounds upon which the jurisdiction of this Court is invoked are: that the petitioner asserts a right, or a defense, created, or recognized, and protected by the statutes of North Carolina; and that the Courts of New York are required, by Article IV, Sections 1 and 2, of the Constitution of the United States, to recognize and protect such right or immunity. Petitioner's right or defense for which he seeks protection is that a demand that he submit a controversy to arbitration in New York has been made upon him, and he contends that, arbitration depending upon contract in both North Carolina and New York, the alleged agreement to submit to arbitration is prevented from having any effect by the statutes of North Carolina set forth in the statement below.

4. The cases believed to sustain the jurisdiction of this Court are: *United Commercial Travelers* v. *Wolfe,* 331 U. S. 586; *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145; and *Broderick* v. *Rosner,* 294 U. S. 629. The judgment sought to be reviewed is a final denial of a right or a defense guaranteed to petitioner by the Constitution of the United States, Article IV, Sections 1 and 2, within the meaning of Section 237, Subsection (b), as amended, of the Judicial Code of the United States. That the judgment is final for review by this Court is shown by *Mt. Vernon-Woodbury Cotton Duck Co.* v. *Alabama Interstate Power Co.,* 240 U. S. 30, and *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8.

III

Statement of the Case

The Court of Appeals' statement of the facts in the case, except petitioner has inserted references to the record, is as follows:

Petitioner Gantt is a North Carolina lumber dealer, using the business name of Southland Supply Company (R. 7). Respondent Hurtado & Cia., Ltda., is a Nicaraguan partnership (or corporation) doing business in that republic (R. 11). In July, 1946, at High Point, North Carolina, an authorized representative of Hurtado made two written agreements with "Southland Supply Company", the signatures of the latter being by W. O. Carter, who, in one of those agreements, styled himself "manager" but whose authority to contact for petitioner Gantt is now disputed by the latter (R. 18). Each of these July, 1946, writings called for the sale and delivery by Hurtado to "Southland Supply Company", of large quantities of various kinds of tropical woods to be shipped from Nicaraguan ports, at prices f.o.b. those ports, to High Point (R. 18). Each of those agreements called for the opening by the buyer, for the seller, of an irrevocable letter of credit, the place where such letter of credit was to be obtained not being stated (R. 18). Both those July, 1946, agreements were modified in various respects by a third document, signed at High Point in September of that year by a representative of Hurtado and by "Southland Supply Company, W. O. Carter" (R. 19). The September pact contained the first mention of arbitration, the language being: "Any controversy or claims arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the rules of the Inter-American Commercial Arbitration Commission. This agreement

shall be enforceable and judgment upon any award rendered by the arbitrators or a majority of them may be entered in any Court having jurisdiction. The arbitration shall be held in New York, N. Y."
(End of Court's statement.)

This third document containing the provision quoted above had petitioner's name typed with a place for his signature above it. The document was submitted to him for signature, and he refused to sign (R. 9). Petitioner contends that this was an outright refusal of the document as a contract, and the respondent contends that petitioner said that his signature was not necessary for the alleged agent had full authority (R. 13).

The general statutes of North Carolina (1943), Division II, Chapter 1, Article 45, Sections 1-544 and 1-545, Volume I, page 387, are:

Agreement for Arbitration.—Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this article, any controversy existing between them at the time of the agreement to submit. Such an agreement shall be valid and enforceable, and neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or in equity for the rescission or revocation of any contract (1927, c. 94, s. 1).

Statement of questions in controversy.—The arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based (1927, c. 94, s. 2).

IV

Specification of Errors

1. The Court of Appeals erred in finding and holding: that, although the alleged agreement to submit to arbitration is unenforceable in North Carolina, the Court of Appeals is not required by Article IV, Sections 1 and 2, of the Constitution of the United States to hold that the alleged agreement to arbitrate is unenforceable in New York and that the said demand for arbitration ought to be restrained.

2. The Court of Appeals erred in finding and holding: that, the alleged agreement to submit to arbitration is not void in North Carolina, and, therefore, the Court of Appeals is not required by Article IV, Sections 1 and 2, of the Constitution of the United States to hold that the said demand for arbitration ought to be restrained.

V

Argument

A. The judgment is final, so far as the jurisdiction of this Court applies, in that it denies a right or defense guaranteed by the Constitution of the United States.

B. Since the alleged agreement to submit to arbitration is by statute of the State made unenforceable in North Carolina, both Sections 1 and 2 of Article IV of the Constitution of the United States require that the agreement be held to be unenforceable in New York, and that the arbitration demanded by respondent be permanently enjoined.

C. Since the alleged agreement to submit to arbitration is by statute of the State made void in North Carolina,

both Sections 1 and 2 of Article IV of the Constitution of the United States require that the agreement be held to be void in New York, and that the arbitration demanded by respondent be permanently enjoined.

D. Since the alleged agreement to submit to arbitration is unenforceable in North Carolina, both Sections 1 and 2 of Article IV of the Constitution of the United States require that the agreement be held to be unenforceable in New York, and that the arbitration demanded by respondent be permanently enjoined.

A

The judgment is final, so far as the jurisdiction of this Court applies, in that it denies a right or defense guaranteed by the Constitution of the United States.

Should the trial of the issue of fact, whether petitioner is bound by the act of his alleged agent, be finally decided against petitioner and, pursuant to the order of the Supreme Court of New York, the arbitration demanded by respondent proceed to an award against petitioner, there would follow an effort to obtain execution of a judgment against petitioner in North Carolina. If in the meantime the contentions presented here by petitioner had not been decided by this Court, petitioner could raise them in North Carolina; and after final judgment upon an award the questions presentable to this Court would not be different from what they are now. In the affidavit upon which petitioner asked for the permanent restraint of this arbitration, there is the averment that the trial of the issue of fact, which would involve useless expense if petitioner's contentions as to his constitutional rights are correct, would cost petitioner several thousand dollars (R. 4). This constitutes irreparable injury and to require petitioner to undergo needlessly such expense would be to subject him

to "irremediable liability". Thus the judgment is final within the meaning of Section 237 (b) of the Judicial Code.

Mt. Vernon-Woodbury Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U. S. 30.

Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8.

B

Since the alleged agreement to submit to arbitration is by statute of the State made unenforceable in North Carolina, both Sections 1 and 2 of Article IV of the Constitution of the United States require that the agreement be held to be unenforceable in New York, and that the arbitration demanded by respondent be permanently enjoined.

The reasoning of the Court of Appeals is based upon two propositions: that arbitration relates merely to the remedy, or is a remedy; and that the remedy is determinable by the law of the forum. From these two premises has been drawn the conclusion that the Full Faith and Credit Clause is not applicable to a test of the validity of an executory agreement to submit to arbitration.

This reasoning does not give full effect to two well established principles of law applicable to an executory agreement to submit to arbitration:

1. Such an agreement, although expressed in a document evidencing a different contract, "is collateral and independent".

Hamilton v. *Home Insurance Co.*, 137 U. S. 370, at 383;

Meacham v. *Jamestown F. & C. R. R. Co.*, 211 N. Y. 346.

2. Whether arbitration may be ordered by a court depends upon contract in New York as well as in North Carolina.

Matter of Lehman v. *Ostrovsky*, 264 N. Y. 130.

Whether arbitration be called a remedy or some other term applied to it makes no difference. Before arbitration may be had "the substantive right" involved in the question, whether a valid executory agreement to submit to arbitration exists, must be determined. In *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, at 123, the Court says, "The substantive right created by an agreement to submit disputes to arbitrators is recognized as a perfect obligation". The Court also sustains petitioner's contention in *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, at 160, by saying:

But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply. Compare *Home Ins. Co.* v. *Dick*, 281 U. S. 397. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.

It follows that the denial that such a right or obligation exists is also the assertion of a substantive right or defense. The question, whether this denial is valid, or whether a defense against being compelled to submit a controversy to arbitration exists, is one of substantive law. When this case came before the Supreme Court of New York, it had no question about a remedy to decide; but the sole question was whether a valid contract to submit to arbitration exists. It was error to make the an-

swer to this question depend upon the facts only. The validity of the agreement depends upon the law applicable to the making of the agreement as well as upon the facts. When the Supreme Court of New York ordered a trial of the issue of fact, whether petitioner had become bound by the act of his alleged agent, it recognized that arbitration may not be compelled without determining the validity of the executory agreement to arbitrate. The validity of a contract has always been determinable by *lex loci contractus*.

Bond v. *Hume*, 243 U. S. 15;
Hartford Acc. & Ind. Co. v. *Delta & Pine Lumber Co.*, 292 U. S. 143.

One of the purposes of the Full Faith and Credit Clause was to guarantee to the citizens of the various states that they would have the benefit of their local law in determining whether a contract has been made. There is not in the words of the Constitution any exception which permits the conclusion that the determination of a remedy is not subject to the Full Faith and Credit Clause. The Court of Appeals, however, has made this exception and drawn an erroneous conclusion which contradicts the conclusion of this Court in *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586.

Had the New York statutes conferred upon the courts the power to order arbitration as a remedy without consent of the parties, then the reasoning of the Court of Appeals expressed in its opinion might be valid. When the opinion says, however, that the agreement is unenforceable in North Carolina and, this notwithstanding, says further that the Full Faith and Credit Clause does not require that the agreement be declared unenforceable in New York, the opinion not only becomes logically indefensible

but contradicts what this Court says in *United Commercial Travelers* v. *Wolfe,* 331 U. S. at 607:

> * * * The full faith and credit clause applied as in the present case, is but another limitation voluntarily imposed, by the people of the United States, upon the sovereignty of their respective states in applying the law of the forum. * * *

C

Since the alleged agreement to submit to arbitration is by statute of the State made void in North Carolina, both Sections 1 and 2 of Article IV of the Constitution of the United States require that the agreement be held to be void in New York, and that the arbitration demanded by respondent be permanently enjoined.

Petitioner has not, at any time, confined his argument to the proposition that the statute of North Carolina makes the agreement to submit to arbitration alleged by respondent void, but nevertheless, this proposition is valid. The statutes of North Carolina require that any agreement to submit to arbitration "present one or more issues or questions upon which an award may be based".

In *Williams* v. *Manufacturing Co.,* 154 N. C. 205, at 206, the Supreme Court of North Carolina says:

> It has generally been held that an agreement to arbitrate controversies which may arise in the course of executing a contract is void, as its effect is to oust the jurisdiction of the courts. * * *

Both *Nelson* v. *Atlantic Coast Line,* 157 N. C. 194, and *Tarpley* v. *Arnold,* 226 N. C. 679, cited by the Court of Appeals, involved agreements which had been partially performed by the parties submitting to arbitration. In the *Nelson* case, 157 N. C., at 203, the Court says:

> The rights of the parties cannot, however, be determined strictly upon the principle governing arbitrations,

because the plaintiff acquires his right to the benefits he claims under the rules of the relief department, and he has by contract attached to the enjoyment of these benefits the condition that he will abide by all reasonable regulations.

The Supreme Court of North Carolina, in this case, also points out, 157 N. C., at 202, that "after the arbitrators have acted and rendered an award, the case is very different". It seems that this gives the reason for the decision in the *Nelson* case.

In the *Tarpley* case, 226 N. C. 679, a pending action of ejectment was adjourned and the dispute submitted to arbitration. The question involved in the case was whether the arbitrator selected had resigned and been relieved befor he had made his award. There is nothing in this case that affects the case at bar.

Whatever may have been the law of North Carolina about an executory agreement to arbitrate being void or unenforceable, the enactment of the statutes above quoted required that such an agreement, to have any validity, must "present one or more issues or questions upon which an award may be based". This makes void any such agreement as the one involved here, which does not provide for the submission of a definite issue to arbitrators. Thus, North Carolina now has a definite legislative command that no executory agreement to arbitrate shall be valid.

D

Since the alleged agreement to submit to arbitration is unenforceable in North Carolina, both Sections 1 and 2 of Article IV of the Constitution of the United States require that the agreement be held to be unenforceable in New York, and that the arbitration demanded by respondent be permanently enjoined.

This point is included because of the possibility that the Court may take the view that the agreement in ques-

tion is either unenforceable or void in North Carolina by virtue of the combined effect of the common law as declared by the Supreme Court of that State and the statute above set out.

It seems that in *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, at 609, this Court indicates that in order for a defense in one State to be entitled to protection in another State, under the Full Faith and Credit Clause, it is not necessary that the defense be actually created or authorized by statute, but that it is sufficient if the law in the State of origin authorizes the creation of the defense by private contract. In *Cole* v. *Cunningham*, 133 U. S. 111, at 114, Article IV, Section 2, is held to include "the right to institute action". From this it follows that the section includes both a defense against an action and one against being subjected to liability imposed by the uncontrolled will of arbitrators.

The attention of the Court is also invited to the fact that Section 4 of the Federal Arbitration Act, Title 9, United States Code, provides that, in order to enforce, in the Courts of the United States, an agreement to submit to arbitration, notice of the demand must be served "in the manner provided by law for the service of summons in the jurisdiction", and that the hearing and proceedings before arbitrators "shall be within the district in which the petition for an order directing such arbitration is filed". In the case at bar the provision in question contains the sentence: "The arbitration shall be held in New York, N. Y."

When respondent's demand for arbitration herein was sent from New York through the mails to petitioner in North Carolina, petitioner's then counsel was confronted by the decision of the Court of Appeals of New York in *Gilbert* v. *Burnstine*, 255 N. Y. 348. The opinion in the *Gilbert* case, when taken with the first sentence of Section

1450 of the Civil Practice Act of New York, indicates that the sending of this demand to petitioner would have been regarded by the Courts of New York as valid service. This first sentence, added to Section 1450 by the Public Laws of New York (1944), Chapter 423, is:

The making of a contract or submission for arbitration described in section fourteen hundred forty-eight hereof, providing for arbitration in this State, shall be deemed a consent of the parties thereto to the jurisdiction of the Supreme Court of this State to enforce such contract or submission.

In the Matter of United Culinary Bar & Grill Employees v. Schiffman, 272 App. Div. 491, the holding is that personal service of a notice of arbitration is not necessary.

It was, therefore, risky for petitioner to ignore the demand, and his only other choice was to enter a general appearance in this proceeding so as to seek a restraint of the arbitration. There was confusion in the law, and this confusion is well illustrated by the case of *Vitaphone Corp. v. Electrical Research Products,* 19 Del. Ch. 247, in which a suit in equity was brought in Delaware by a party who had, pursuant to a contract to submit to arbitration in New York, demanded arbitration and had compelled its adversary to spend a half million dollars on the arbitration. The holding of the lower court, that the suit could be maintained, was reversed, 20 Del. Ch. 417, on the ground that the plaintiff in the suit did not come into equity with clean hands. Had the Delaware Court been passing upon an action at law instead of a suit in equity, the indications are that the decision of the lower court, based upon the idea that arbitration is a remedy, would have been affirmed. The statement by the Court of Appeals of New York that the validity of an agreement to submit to arbitration a controversy thereafter arising must be deter-

mined by the law of the forum in *Meacham* v. *Jamestown F. & C. R. R. Co.*, 211 N. Y. 346, at 352, was made, without giving either reason or authority, only twenty years after the House of Lords in *Hamlyn & Co.* v. *Talisker Distillery*, 1894 A. C. 202, had unanimously held that such a statement of the law could not be sustained either on principle or on authority. The opinions in this case in the House of Lords demonstrate clearly that erroneous and unnecessary confusion arises from the prevalence, in the courts of many states, of the fallacious idea that the question whether arbitration may be had depends upon procedural instead of substantive law. Many of the states have statutes which do not permit executory agreements to arbitrate, while others have statutes permitting such agreements. The result, according to the Court of Appeals' decision, is that a party who has agreed to submit to arbitration in one state may bring an action at law about the same controversy in another state. All this confusion may be removed by this Court's holding that arbitration depends upon a valid contract; that the rights and obligations created by such a contract must be determined as substantive law; and that such rights must be protected according to Article IV, Sections 1 and 2, of the Constitution. With all due respect to the Court of Appeals' citation of *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 121, as authority to sustain the holding that the validity of an agreement to arbitrate must be determined by the law of the forum, this Court has never approved this statement of the law, and we respectfully submit that the statement ought not to be approved.

The intention of Congress may have been to make the Federal Act apply exclusively to any executory agreement to arbitrate made as the result of any contract in foreign commerce or commerce among the states. Thus the combined effect of the Federal Act and the law of North Caro-

lina is to give petitioner protection which has been denied to him by the courts of New York, and the Constitution requires that this protection be given.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the answers to the important questions of constitutional law involved may be made certain, that the principles written into the Constitution be upheld, and that to such an end a writ of certiorari ought to be granted so that this Court may review and finally reverse the decision of the Court of Appeals of New York.

EDWARD JEROME,
Counsel for Petitioner.

HORACE A. TEASS,
Of Counsel.

(7717)

FILE COPY

FILED
SEP 20 1948

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 214.

R. B. GANTT,

Petitioner,

against

FELIPE Y CARLOS HURTADO & CIA., LTDA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Counsel for petitioner, R. B. Gantt, has set forth in his brief in support of the petition for a writ of certiorari substantially the same arguments and reasoning which have been presented successively to Mr. Justice Church, of the Supreme Court of New York, to the Appellate Division of the First Department of the Supreme Court of New York and, finally, to the Court of Appeals.

The opinions rendered by Mr. Justice Church, sitting as the Court of first instance, and by Judge Desmond, of the Court of Appeals (published in full at pp. 21-31 of the Transcript of Record), deal fully and comprehensively with the questions sought to be raised again before this Court by the petitioner, and reject petitioner's contentions.

The Appellate Division, in unanimously sustaining the decision of Mr. Justice Church, rendered no independent opinion. It may therefore be correctly stated that the opinion rendered by Mr. Justice Church would stand as the approved expression of the law of the State of New York

on the subject at hand, had no appeal been taken to the Court of Appeals.

The opinion of Judge Desmond of the Court of Appeals, which received the unanimous support of that Court, is in a sense complementary to the opinion expressed by Mr. Justice Church. Both opinions taken together express the considered position of the courts of the State of New York to the effect:

1. That under the New York Arbitration Law an agreement voluntarily entered into by parties residing outside of that State to submit controversies arising *in futuro* to an Arbitration Tribunal in New York will be enforced; and

2. That the non-enforceability in the State where executed of a clause contained in a commercial contract requiring arbitration of disputes arising *in futuro* is no bar to the enforcement of such provision in New York when the parties to the agreement have voluntarily and affirmatively selected that state and an Arbitration Tribunal there located as the forum.

With respect to the petition for a writ of certiorari we are content to rely for our argument in opposition on the opinions of Mr. Justice Church and Judge Desmond referred to above.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari be dismissed.

FRANK RASHAP,
Counsel for Respondent.

WALTER M. HINKLE,
Of Counsel.